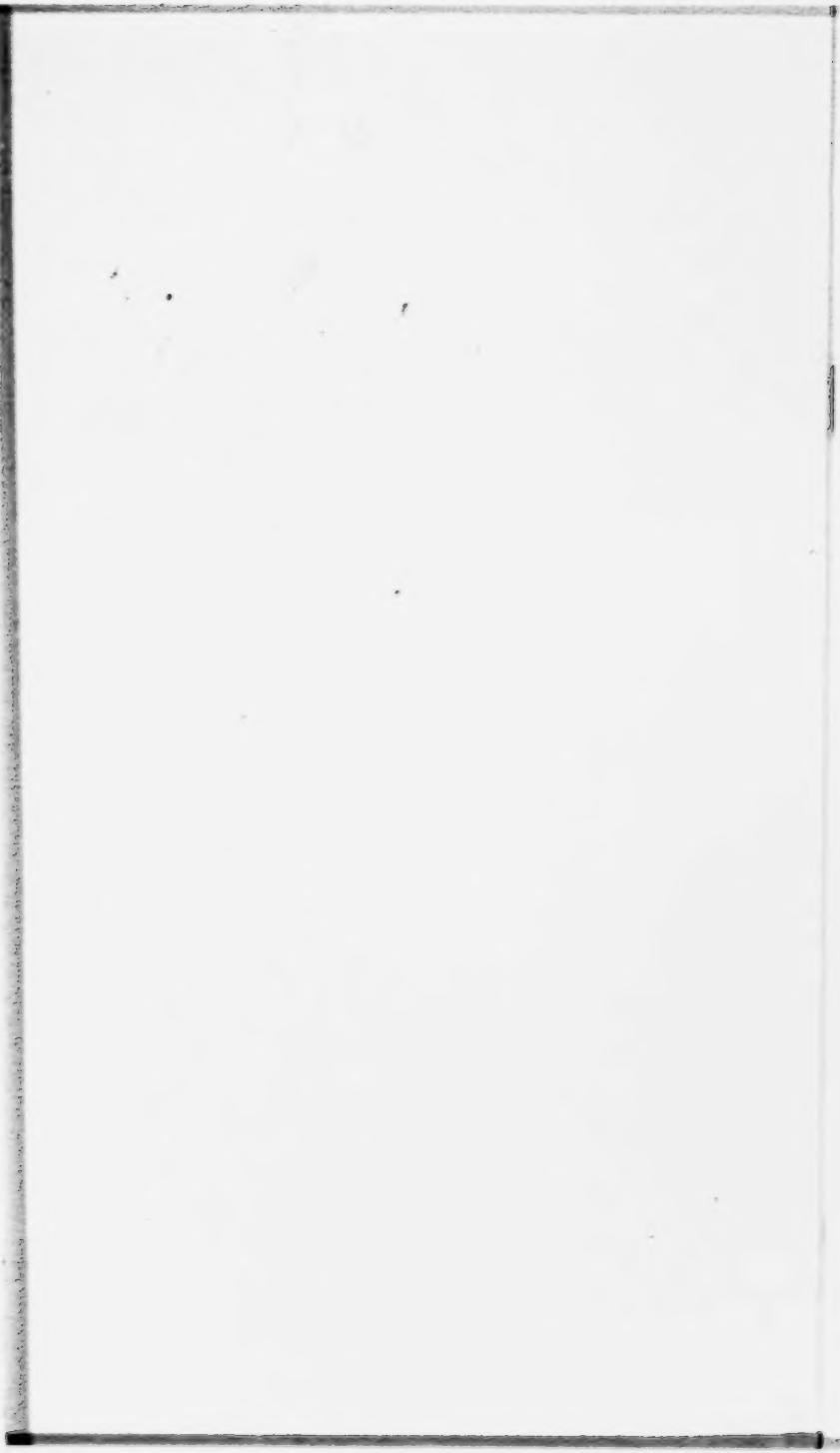

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-349

WINEGLASS RANCHES, INC.; B. A. YARBRO and ENID W. YARBRO; J. C. RAINERI and (ELEANOR C. RAINERI), *Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

Respondent requests that the petition for a writ of certiorari in this matter be denied.

### OPINIONS BELOW

The unreported findings of fact, conclusions of law and summary judgment of the United States District Court for the District of Arizona appear as Appendix "C" to the petition for a writ of certiorari. The

* Eleanor C. Raineri was never served as a defendant in the District Court and did not join in the Notice of Appeal filed on behalf of the other appellants. She is therefore not a proper party before this Court.

memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court appears as Appendix "A" to the petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1973. A timely filed petition for rehearing was denied on July 25, 1973 (Appendix "B" to the petition for certiorari). The petition for certiorari was filed on August 24, 1973. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

The petition for certiorari enumerates fourteen "Questions Presented." Nine of these were not raised before the District Court or the Court of Appeals. The other five are essentially variations of the same question. The only question now properly before this Court is the one presented to the Court of Appeals, which we restate as follows:

> Was the District Court correct in granting and the Court of Appeals correct in affirming the summary judgment awarded plaintiff after determining that the defenses asserted by the defendants in their proposed amended answer could not be sustained even if filed?

## STATUTES INVOLVED

Arizona Revised Statutes § 12-548 (1956).

## STATEMENT

### A. Factual Background

This is a diversity case brought in the District of Arizona by Federal Deposit Insurance Corporation (FDIC) as receiver of the San Francisco National

Bank (the bank). In order to procure a loan, the various defendants executed or guaranteed a $150,000 demand note which was delivered to the bank. In connection with that transaction, two individuals, Joseph D. Morris and Bernard S. Garrett (Morris and Garrett), entered into an agreement with the defendants whereby $110,000 of the loan would go to the defendants who would use it to acquire an outstanding mortgage foreclosure judgment against their property. The remaining $40,000, under the agreement, was to go to Morris and Garrett for use as they saw fit. Subsequently, the defendants allowed the note to go into default.

### B. Proceedings in the District Court

FDIC filed suit to collect the balance due on the promissory note. The defendants filed a general denial. After a jointly prepared pretrial stipulation and order was filed with and signed by the court, and after the pretrial conference, the defendants filed an amended answer without first requesting or obtaining leave of court. In this amended answer, defendants attempted to inject the defenses of lack of consideration and usury into the case. The court requested and received simultaneous motions for summary judgment from the parties, and FDIC filed objections to and moved to strike defendants' amended answer.

The District Court granted FDIC's motion to strike the amended answer; granted FDIC's motion for summary judgment; and denied defendants' summary judgment motion. Thereafter, the District Court entered its findings of fact, conclusions of law and judgment (Appendix "C").

The District Court found that the $40,000 retained by Morris and Garrett was a finders' fee or commission for procuring the loan evidenced by the promissory note. The Court further found under applicable state law that Morris and Garrett in securing the loan for the defendants were not acting as agents for the bank and that no competent evidence could be adduced to prove that they were acting as agents. Thus, since the $40,000 did not go back to the bank, the District Court concluded that the defenses of lack of consideration and usury would fail even if the amended pleadings were allowed. No federal questions whatsoever were raised before it.

### C. Proceedings in the Court of Appeals

The Court of Appeals affirmed the District Court. It stated that the only issue before it was whether the trial court had erred in granting the motion for summary judgment of FDIC and denying the motion of defendants. The Court of Appeals agreed with the District Court that the undisputed facts disclosed that Morris and Garrett were not agents for the bank. The court found that an affidavit of defendant Yarbro, which purported to establish such an agency relationship, was ineffective as a matter of state agency law to do so. The court therefore found no reason for FDIC to file controverting affidavits.

## REASONS FOR DENYING THE WRIT

### A. The Lower Courts Properly Analyzed the Facts and Determined Questions of State Law that Should Not Be Reviewed Here.

Both the District Court and the Court of Appeals properly determined that in light of the agreement between Morris and Garrett and the defendants, it

was undisputed that Morris and Garrett were not acting as agents of the bank. Both courts also held that under established principles of agency law, the affidavit of defendant Yarbro could not and did not create a fact issue on the agency question. The Court of Appeals said:

> "The Yarbro affidavit was defective in that by it the appellants sought to prove agency based on the declarations of the alleged agents. The uncorroborated declaration of an alleged agent is not sufficient to establish the agency. [Citations omitted]." Appendix "A", p. 3.

The lower courts found that if Morris and Garrett were not agents, then the $40,000 they received could not be interest to the bank. It was simply a commission that the defendants agreed to pay. Such a view of the facts wholly destroyed the defenses of usury and lack of consideration.

This Court will ordinarily deny certiorari, where, as here, review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments. *R. Stern & E. Gressman, Supreme Court Practice* 172 (4th ed. 1969). As this Court stated in *United States* v. *Johnston,* 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925), "We do not grant a certiorari to review evidence and discuss specific facts." This is particularly true when the two courts below have concurred. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672 (1949), and cases there cited; *Berenyi* v. *District Director, Imm. & Nat. Serv.,* 385 U.S. 630, 635, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

**B. The Other "Questions Presented" Have Not Been Raised Below and Should Not Be Given Consideration Here**

Of the fourteen so-called questions presented, only numbers 2, 3, 5, 12 and 13 bear even the remotest relationship to the questions presented and resolved by the District Court and the Court of Appeals. The remaining questions presented were not raised or even hinted at below. It is well established that a point raised for the first time before this Court will not be considered. *United States* v. *New York Telephone Co.*, 326 U.S. 638, 650, 66 S. Ct. 393, 90 L. Ed. 371 (1946); see also, *Hormel* v. *Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

The only issue raised for the first time in the petition for certiorari having any conceivable merit is defendants' contention that plaintiffs' action was barred by the statute of limitations, Arizona Revised Statutes § 12-548 (1956). Although we do not believe this issue is properly before this Court, it can be easily disposed of. Petitioners rely upon the Arizona six-year contract limitation period, and contend that this suit was brought more than six years after the note was executed. Petitioners forget that the note was a demand note, and as such was not due until demand. Therefore, the limitation period did not begin to run until demand was made, less than six years before suit was instituted. *Baca* v. *Bank of America, National Trust and Savings Association*, 99 Ariz. 352, 409 P.2d 52 (1965); *Button* v. *Wakelin*, 41 Ariz. 84, 88, 15 P.2d 956 (1932); *Starr* v. *Stiles*, 2 Ariz. 436, 440, 19 P. 225 (1888).

## CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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*Corporation.*

September, 1973